10

STATE OF MICHIGAN
IN THE SUPREME COURT

SUPREME COURT

NOV 2003

Appeal from the Court of Appeals
Docket No. 243182

TERM

MAYOR OF THE CITY OF LANSING,
CITY OF LANSING, and INGHAM
COUNTY COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

v

MICHIGAN PUBIC SERVICE COMMISSION
and WOLVERINE PIPE LINE COMPANY

Appellants/Cross-Appellees.

Supreme Court
Case No. 124136

Court of Appeals
Case No. 243182

MPSC Case No. U-13225

James D. Smiertka (P20608)
John M. Roberts Jr. (P19502)
Margaret E. Vroman (P34502)
Brian W. Bevez (P28736)
Office of Lansing City Attorney
Attorneys for Appellees & Cross Appellants
Mayor David C. Hollister and
City of Lansing
5th Floor, City Hall
Lansing, MI 48933
(517) 483-4320

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
Attorneys for Appellant & Cross Appellee
Wolverine Pipe Line Company
124 W. Allegan
Lansing, MI 48933
(517) 374-9155/9184

Of Counsel:
Paul O'Konski
Law Department
Wolverine Pipe Line Co.
P.O. Box 2220
Houston, TX 77252-2220
(713) 656-4669

Mary Massaron Ross (P43885)
Attorneys for Appellees & Cross-Appellants
Plunkett & Cooney, PC
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

Michael Cox
Attorney General of Michigan
Thomas L. Casey
Solicitor General
David A. Voges (P25143)
Henry J. Boynton (P25242)
William W. Derengoski (P34242)
Assistant Attorneys General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
(517) 241-6680

CROSS APPELLEE WOLVERINE PIPE LINE COMPANY'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

ORAL ARGUMENT REQUESTED i

TABLE OF CONTENTS i

INDEX OF AUTHORITIES iv

CONCURRENCE IN STATEMENT JURISDICTION viii

COUNTER-STATEMENT OF QUESTIONS INVOLVED ix

COUNTER-STATEMENT OF STATEMENT OF FACTS AND PROCEEDINGS 1

A. THE PUBLIC'S NEED FOR THE PIPELINE. 1

B. THE PIPELINE'S LENGTH, LOCATION, AND INTERSTATE CHARACTERISTICS. 2

C. THE MPSC PROCEEDINGS 3

D. THE COURT OF APPEALS DECISION. 6

E. THE PROCEEDINGS BEFORE THIS COURT. 8

SUMMARY OF ARGUMENT 9

I. THE MICHIGAN CONSTITUTION 1963, ARTICLE 7, SECTION 29 DOES NOT REQUIRE AN INTERSTATE PIPELINE COMPANY TO OBTAIN LOCAL CONSENT WHEN IT SEEKS TO CONSTRUCT AN INTERSTATE PIPELINE IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY OWNED AND CONTROLLED BY THE STATE OF MICHIGAN IN ORDER TO SATISFY A STATE RECOGNIZED PUBLIC NEED FOR PETROLEUM PRODUCTS. 10

A. Standard Of Review. 10

B. Article 7, Section 29 of the Michigan Constitution Does Not Require An Interstate Pipeline To Obtain Local Consent To Construct Its Interstate Pipeline In An Interstate Highway Right-Of-Way Where Paramount Issues Of State Concern Are Implicated. 10

1. I-96 Is Not A Highway, Street, Alley Or Public Place "Of" The City But An Interstate Highway That Is Part Of A National Highway System With Its Longitudinal Rights-Of-Ways Under The Control Of The State Department Of Transportation. 11

a. I-96 Is An Interstate Highway.....11

b. Interstate Highways Like I-96 Originated With The Federal Government And The Use Of Interstate Highway Rights-Of-Ways Are Regulated By State Transportation Departments Such As The Michigan Department Of Transportation.....12

c. I-96 Is Also A Limited Access Highway.....14

d. I-96 Is An Interstate Highway And Not Part Of A Municipal System Of Streets And Is Not A Highway "Of" The City.....15

e. The Case Law Relied Upon By The City To Argue That Article 7, Section 29 Of The Michigan Constitution of 1963 Requires Local Consent Is Distinguishable From The Facts Of This Case Because It Does Not Involve An Interstate Highway.....15

2. This Court Has Repeatedly Held That Paramount State Interests Override Mere Local Concerns.....18

3. Requiring Local Consent Over An Interstate Pipeline In An Interstate Highway Right-Of-Way Would Violate The Commerce Clause Of The United States Constitution. 21

a. Wolverine's Pipeline Operates In Interstate Commerce.....23

b. The City's Refusal To Permit Construction Of The Pipeline Would Constitute A Clearly Excessive Burden On Interstate Commerce And Be Unreasonable.....24

II. MCL 247.183 DOES NOT REQUIRE AN INTERSTATE PIPELINE COMPANY TO OBTAIN LOCAL CONSENT FOR THE CONSTRUCTION OF AN INTERSTATE PIPELINE SEGMENT WITH AN INTERSTATE HIGHWAY'S RIGHT-OF-WAY FOR THE PURPOSE OF SATISFYING A RECOGNIZED PUBLIC NEED. 26

A. Standard Of Review.....26

B. The Plain Language And Structure Of MCL 247.183 Shows That Wolverine May Install Its Proposed Pipeline In The I-96 Rights-Of-Way Without Consent From The City Of Lansing. 26

1. MCL 247.183's Plain Language Does Not Require Consent. 27

2. The Apparent Purpose And Legislative History Of MCL 247.183 Further Demonstrate That Wolverine Need Not Obtain The City's Consent To Construct Its Pipeline In The I-96 Rights-Of-Way. 31

a. The Federal Accommodation Of Public Utilities In Highway Rights-Of-Ways. 32

b. The State Of Michigan's Accommodation Of Utilities In Highways Under Section 13 Of Michigan Public Act 368 Of 1925, As Amended. ..33

3. Wolverine's Interpretation Is Consistent With Case Law Recognizing That Paramount State Interests Trump Mere Local Concerns And The Interpretation Also Avoids Burdening Interstate Commerce. 36

III. EVEN ASSUMING CITY CONSENT IS REQUIRED (WHICH IT IS NOT), THE MPSC AND COURT OF APPEALS PROPERLY DETERMINED THAT NO CONSENT NEED ACCOMPANY AN ACT 16 APPLICATION. 37

A. Standard Of Review. 37

B. Rule 601 Does Not Require An Act 16 Application To Contain Local Consent. 38

CONCLUSION AND RELIEF REQUESTED 42

INDEX OF AUTHORITIES

Cases

Allen v Rogers, 246 Mich 501; 224 NW 632 (1929) 18, 19, 20

Allen v Ziegler, 338 Mich 407; 61 NW2d 625 (1953) 20

Attorney General v Public Service Commission, 206 Mich App 290; 520 NW2d 636 (1994) 37

Case v City of Saginaw, 291 Mich 130; 288 NW 357 (1939) 20

Cities Service Gas Co v Peerless Oil & Gas Co, 340 US 179; 71 S Ct 215; 95 L Ed 190 (1950)22

City of Marshall v Consumers Power Co, 206 Mich App 666; 523 NW2d 483 (1994) 37, 41

City of Niles v Michigan Gas & Electric Co, 273 Mich 255; 262 NW 900 (1935) 17

CMS Energy Corp v Attorney General, 190 Mich App 220; 475 NW2d 451 (1991) 37

Compton Sand & Gravel Co v Dryden Twp, 125 Mich App 383; 336 NW2d 810 (1983) 16

Dean Milk Co v City of Madison, 340 US 349; 71 S Ct 295; 95 L Ed 329 (1951) 22

Gibbons v Ogden, 22 US 1, 194 (9 Wheat 1) 24

Hughes v Oklahoma, 441 US 322; 99 S Ct 1727; 60 L Ed 2d 250 (1979) 22

Indiana & Michigan Power Co v Michigan, 405 Mich 400; 275 NW2d 450 (1979) 24

Jennings v Southwood, 446 Mich 125; 521 NW2d 230 (1994) 29

Jones v City of Ypsilanti, 26 Mich App 574; 182 NW2d 795 (1971) 20, 21

Lorencz v Ford Motor Co, 439 Mich 370; 483 NW2d 844 (1992) 31

Maine v Taylor, 477 US 131; 106 S Ct 2440; 91 L Ed 2d 110 (1986) 22

Michigan Consolidated Gas Co v Public Service Commission, 389 Mich 624; 209 NW2d 210 (1973) 37

Panhandle Eastern Pipe Line Co v Michigan Public Service Comm, 341 US 329; 71 S Ct 777; 95 L Ed 993 (1951) 24

Panhandle Eastern Pipe Line Co v Public Service Comm of Indiana, 332 US 507; 68 S Ct 190; 92 L Ed 128 (1947) 25

Panhandle Eastern Pipe Line Co v Public Utilities Comm, 56 Ohio St 2d 334; 383 NE2d 1163 (1978) 24

People v Asta, 337 Mich 590; 60 NW2d 472 (1953) 22

People v Cash, 419 Mich 230; 351 NW2d 882 (1984) 40

People v Hall, 381 Mich 175; 215 NW2d 166 (1974) 31

People v. McGraw, 184 Mich 233;150 N.W. 836 19

Pike v Bruce Church, Inc, 397 US 137; 90 S Ct 844; 25 L Ed 2d 174 (1970) 23

Reiss v Pepsi Cola Metropolitan Bottling Company, 249 Mich App 631; 643 NW2d 271 (2002) 37

Robertson v DaimlerChrysler Corp, 465 Mich 732; 641 NW2d 567 (2002) 30

Robinson Twp v Board of County Road Commissioners, 114 Mich App 405; 319 NW2d 589 (1982) 16, 17

Sibel v State Police, 154 Mich App 462; 397 NW2d 828 (1986) 37

Tennessee Gas Transmission Co v Thatcher, 84 F Supp 344 (WD La 1949) 23, 24

Thomas Township v John Sexton Corp, 173 Mich App 507; 434 NW2d 644 (1988) 37

Transcontinental Gas Pipe Line Corp v Borough of Milltown, 93 F Supp 287 (D NJ 1950) 25, 26

Union Twp v City of Mt. Pleasant, 381 Mich 82; 158 NW2d 905 (1968) 15, 16, 17

United States v Ohio Oil Co, 234 US 548; 34 S Ct 956; 58 L Ed 1459 (1914) 24

Walen v Dep't of Corrections, 443 Mich 402; 505 NW2d 519 (1993) 40

Westlake Transportation Inc v Michigan Public Service Comm, 255 Mich App 589; 662 NW2d 784 (2003) 23

Statutes

1909 PA 106, §4, MCL 460.554 40

1925 PA 368 (Eff Aug 27, 1925) 33

1929 PA 9, MCL 483.101 et seq ..... passim

1929 PA 16, MCL 483.1 *et seq* ..... passim

1929 PA 69, MCL 460.501 *et seq* ..... passim

1972 PA 268 (Eff Oct 11, 1972) 33

Public Act 365 of 1925 34
Public Act 51 of 1951 15
23 USC 101(5) 12
23 USC 103 12
23 USC 116(a) 13
MCL 247.2 17
MCL 247.183 ..... passim
MCL 247.652 15
MCL 247.656 15
MCL 252.2 14
MCL 252.51 14
MCL 252.151(1)(d) 12
MCL 252.302(d) 12
MCL 284.183(2) 35
MCL 460.503 40
MCL 462.25 37
MCL 462.26(8) 37
MCL 483.5 7
McNitt Act 15, 16, 17
Public Act 106 of 1972 11
Public Act 12 of 1967 12
Public Act 205 of 1941, MCL 252.51, *et seq.* 14
Public Act 381 of 1925 14
Public Act 51 of 1951 15

Other Authorities

15A Am Jur 2d *Commerce* § 1 (2003) 21

Accommodation of Utilities; Longitudinal Use of Freeway Right-of-Way, 51 Fed Reg 45479 (1986) 13, 32, 33

Accommodation of Utilities; Longitudinal Utility Use of Freeway Right-of-Way, 53 Fed Reg 2829-01 (1988) 13, 33

Random House Webster's College Dictionary (2001) 28

Ronald C. Peterson and Robert M. Kennan, Jr., *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 50001 (1972) 13

Rules

1929 PA 9, MCL 483.101 *et seq.* ("Act 9"); 39

MCR 7.212(C)(6) 1

Rule 103(2) of the MPSC's Rules of Practice and Procedure, R 460.17103(2) 42

Rule 601 of the Commission's Rules of Practice and Procedure, R 460.17601 (2)(d) ..... passim

Regulations

23 CFR 645.209(c)(1) 13

23 CFR 645.105 ..... passim

23 CFR Part 645 ..... 13, 32, 33

Title 23, Part 645 of the Code of Federal Regulations 32, 34

CONCURRENCE IN STATEMENT JURISDICTION

Appellees/Cross-Appellants Mayor of City of Lansing's and City of Lansing's statement of jurisdiction is complete and correct.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. **WHETHER THE MICHIGAN CONSTITUTION OF 1963, ARTICLE 7, SECTION 29 REQUIRES AN INTERSTATE PIPELINE COMPANY TO OBTAIN THE CONSENT OF AFFECTED LOCAL GOVERNMENTS FOR THE CONSTRUCTION OF AN INTERSTATE LIQUID PETROLEUM PRODUCTS PIPELINE LONGITUDINALLY IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY OWNED AND CONTROLLED BY THE STATE OF MICHIGAN WHERE THE PIPELINE'S PURPOSE IS TO SATISFY A STATE RECOGNIZED PUBLIC NEED FOR PETROLEUM PRODUCTS?**

The Court of Appeals did not address this question.

Appellant/Cross-Appellee Wolverine Pipe Line Company says "No."

Cross-Appellee the Michigan Public Service Commission says "No."

Appellees/Cross-Appellants Mayor of City of Lansing and City of Lansing say "Yes."

II. **WHETHER THE COURT OF APPEALS COMMITTED REVERSIBLE ERROR WHEN IT HELD THAT MCL 247.183 REQUIRES AN INTERSTATE PIPELINE COMPANY TO OBTAIN THE CONSENT OF AFFECTED LOCAL GOVERNMENTS FOR THE CONSTRUCTION OF AN INTERSTATE LIQUID PETROLEUM PRODUCTS PIPELINE LONGITUDINALLY IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY OWNED AND CONTROLLED BY THE STATE OF MICHIGAN WHERE THE PIPELINE'S PURPOSE IS TO SATISFY A STATE RECOGNIZED PUBLIC NEED FOR PETROLEUM PRODUCTS?**

The Court of Appeals would say "No."

Appellant/Cross-Appellee Wolverine Pipe Line Company says "Yes."

Cross-Appellee the Michigan Public Service Commission says "Yes."

Appellees/Cross-Appellants Mayor of the City of Lansing and City of Lansing say "No."

III. **WHETHER THE COURT OF APPEALS PROPERLY AFFIRMED THE MICHIGAN PUBLIC SERVICE COMMISSION'S JULY 23, 2002 DETERMINATION THAT IT WAS NOT BEREFT OF SUBJECT MATTER JURISDICTION OVER APPELLANT/CROSS-APPELLEE WOLVERINE PIPE LINE COMPANY'S APPLICATION FOR AUTHORITY TO CONSTRUCT, MAINTAIN AND OPERATE A PIPELINE WHERE THERE IS NO**

REQUIREMENT UNDER MICHIGAN CONSTITUTIONAL OR STATUTORY LAW THAT WOLVERINE OBTAIN CONSENT FROM THE CITY OF LANSING FOR ITS PROPOSED PIPELINE AND, EVEN ASSUMING SUCH CONSENT IS REQUIRED, NO STATUTE, RULE, OR LAW REQUIRES THE CONSENT AS A PREREQUISITE TO OBTAINING MICHIGAN PUBLIC SERVICE COMMISSION APPROVAL?

The Court of Appeals would say "Yes."

Appellant/Cross-Appellee Wolverine Pipe Line Company says "Yes."

Cross-Appellee the Michigan Public Service Commission says "Yes."

Appellees/Cross-Appellants Mayor of the City of Lansing and City of Lansing say "No."

COUNTER-STATEMENT OF STATEMENT OF FACTS AND PROCEEDINGS

Omissions or inaccuracies in Appellees/Cross-Appellants Mayor of City of Lansing's and the City of Lansing's (collectively "City") recitation of facts necessitate this separate statement. MCR 7.212(C)(6). Appellant/Cross-Appellee Wolverine Pipe Line Company ("Wolverine") also incorporates its statement of facts and proceedings as set forth in its brief on appeal filed with this Court on October 20, 2003.

A. The Public's Need For The Pipeline.

Wolverine supplies approximately **one-third** of Michigan's liquid petroleum needs.[1] (Wolverine's 11/6/03 App, p 170a). Almost **three years ago**, the Michigan Public Service Commission ("MPSC") found that the **public needed Wolverine's proposed pipeline** so that sufficient quantities of petroleum could be delivered to Michigan, gasoline price spikes could be alleviated, and public safety could be increased:

> Based on its review of the record, the Commission agrees with Wolverine that a need for the proposed pipeline system has been established. As noted earlier in this order, Mr. Woodburn specifically testified that although the 8-inch pipeline has been used as a replacement source of supply following closure of the Total/UDS refinery in Alma, the existing line "does not possess sufficient capacity to supply the current and future needs of this service area." 4 Tr. 447. This may have been a critical factor in the dramatic increase in Michigan gasoline prices last summer. He went on to point out that Wolverine's proposal would help alleviate this supply problem by doubling the pipeline's capacity to approximately 75,000 barrels per day. See, 4 Tr. 445. This assessment of the situation is supported by the Staff's witness, Mr. Mazuchowski, who conceded that "there is a need for the project." 5 Tr. 655. According to Mr. Mazuchowski, it is safer to transport gasoline, diesel, and other petroleum-based distillates by pipeline than by either rail or truck. See, 4 Tr. 607. Thus, because use of Wolverine's proposed system would eliminate 250 to 350 tanker trucks from Michigan's roads each day (3 Tr. 283),

---

[1] Wolverine's shareholders are Citgo Pipeline Investment Co., Marathon Oil Company, PUT LLC, Mobil Pipe Line Company, Equilon Pipeline Company, and TRMI Holdings, Inc. (Wolverine 11/6/03 App, p 169a).

> construction and operation of that system would benefit the public by enhancing safety.
>
> The Commission therefore finds that, based on testimony regarding the lack of adequate pipeline capacity and the potential benefits to be gained by expanding that capacity, a sufficient showing of need was made in this case.

((Wolverine's 11/6/03 App, pp 117a-118a). The MPSC reconfirmed the need for the pipeline in its July 23, 2002 order in Case No. U-13225. (Wolverine's 10/20/03 App, p 36a). Even the City concedes the need to transport gasoline or petroleum products in Mid-Michigan. (Wolverine's 11/6/03 App, p 128a).

B. <u>The Pipeline's Length, Location, And Interstate Characteristics.</u>

Wolverine's proposed pipeline route is approximately 26 miles in length and consists of three segments. (Wolverine's 10/20/03 App, p 1a-2a). The first segment commences near the intersection of Wolverine's existing 8-inch pipeline and Meridian Road. This segment will be constructed on rights-of-way obtained from private landowners and will run along 1.57 miles of Meridian Road, crossing from the east side of the road to the west side along the way. (Wolverine's 10/20/03 App, p 1a-2a; Wolverine's 11/6/03 App, p 183a).

The second segment will enter the I-96 right-of-way from a parcel of private property. It will begin at a point near Interstate Highway I-96 ("I-96") and Meridian Road intersection, and will proceed north and west within the I-96 right-of-way for approximately 22 miles. (Wolverine's 10/20/03 App, p 1a-2a; Wolverine's 11/6/03 App, p 183a). The I-96 right-of-way is under the control and jurisdiction of the Michigan Department of Transportation. The Michigan Department of Transportation consents to Wolverine locating its proposed pipeline in the I-96 right-of-way.

The third and final segment will be constructed on rights-of-way that Wolverine has obtained or will obtain from private landowners. This last segment will commence at a location

in the I-96 right-of-way and proceed in a northeasterly direction approximately 1.2 miles to Marathon Ashland Petroleum's Lansing Terminal. (Wolverine's 10/20/03 App, p 1a-2a; Wolverine's 11/6/03 App, p 183a). Less than five miles of pipeline runs along the border of the City's corporate limits and is contained in the I-96 highway right-of-way.

This pipeline project is one segment of a nationwide petroleum pipeline system. The resulting proposed pipeline system will provide transportation for liquid petroleum products originating from Chicago area refineries and refineries located along the Gulf Coast to the southeastern and central Michigan market areas. (Wolverine's 11/6/03 App, p 142a).

C. The MPSC Proceedings.

The City asserts that Wolverine's application in MPSC Case No. U-13225 "replaced Wolverine's earlier application on March 3, 2000 (MPSC Case No. U-12334) in which it proposed placing a new pipeline alongside its existing pipeline route, which travels through East Lansing and Meridian Township (Okemos)." (City's Brief on Appeal, p 1). The U-13225 application was not a replacement application, but an outgrowth of Wolverine's March 3, 2000 application in MPSC Case No. U-12334. (Wolverine's 10/20/03 App, p 2a).

In Case No. U-12334, Wolverine sought authority under 1929 PA 16, MCL 483.1 *et seq.* ("Act 16")[2] to construct (i) a 20.9 mile-long, 16-inch petroleum pipeline from its Jackson Meter Station in Blackman Township, Jackson County to its Stockbridge Meter Station in Stockbridge Township, Ingham County and (ii) a 42.3 mile-long, 12-inch pipeline from its Stockbridge Meter Station to its LaPaugh Meter Station in Bengal Township, Clinton County. Wolverine's

[2] The City refers to the Act 16 application as an application for a certificate of public convenience and necessity. This is an inaccurate characterization. Certificates of public convenience and necessity are only granted to gas or electric utilities seeking approval under 1929 PA 69, MCL 460.501 *et seq.* Petroleum pipelines are required to seek authority under Act 16.

application in Case No. U-12334 also sought authority to make various upgrades to its meter stations. (Wolverine's 11/6/03 App, pp 103a-122a). Wolverine eventually withdrew from the MPSC's consideration a portion of the proposed pipeline route that than between I-96 and Wolverine's LaPaugh Meter Station. (*Id.*). Subsequently, on March 7, 2001, the MPSC issued an order in Case No. U-12334 that granted Wolverine's motion to withdraw a portion of the proposed pipeline route from the MPSC's consideration. The MPSC also found that the pipeline was needed and the remaining pipeline route was designed and routed in a reasonable manner. (*Id.*).

Following the issuance of the MPSC's order in Case No. U-12334, Wolverine still needed MPSC authority to construct a portion of its 12-inch pipeline from a point near the Meridian Road/I-96 intersection to its LaPaugh Meter Station. Thus, Wolverine submitted its application to the MPSC in Case No. U-13225 seeking such authority. The City was permitted to intervene in the case. (Wolverine 10/20/03 App, p 2a).

The MPSC held evidentiary hearings in Case No. U-13225 on March 25 and 26, 2002, and testimony was submitted by seventeen witnesses. (Wolverine 10/20/03 App, p 4a). At the hearing's conclusion, the City moved for summary disposition[3] on the basis that Wolverine had not submitted proof of municipality consent with its application. (Wolverine 10/20/03 App, p 7a).

On July 23, 2002, the MPSC issued a forty page order that considered the evidence compiled in MPSC Case No. U-13225 and approved Wolverine's application to build a liquid petroleum products pipeline. (Wolverine 10/20/03 App, p 1a-38a). The MPSC concluded in its

---

[3] The City captioned its pleading as a Motion for Directed Verdict but proceeded as a Motion for Summary Disposition.

order that Wolverine had demonstrated a need for the proposed pipeline and that the proposed pipeline system was designed and routed in a reasonable manner. (*Id.* at p 36a).

The MPSC considered several arguments raised by the City in determining that Wolverine should be granted Act 16 authority for its pipeline. First, it considered and rejected the City's Motion to Dismiss, which was based on grounds that Wolverine had not submitted proof of municipality consent with its application, concluding that:

> The Commission finds that it is not bereft of subject matter jurisdiction over the instant application merely because Wolverine did not include proof of having obtained the consent of affected municipalities. In the Commission's view, even if Wolverine is required to obtain the consent or a franchise from the City of Lansing before it begins constructing the pipeline within the city limits, the state constitution, the cited statutes, and the Commission's rules do not require Wolverine to do so before the application may be considered and disposed of by the Commission. Because no law requires that Wolverine provide those consents or franchises with its application, Rule 601(2)(d) does not require that the Commission dismiss the case.

(Wolverine 10/20/03 App, p 11a).Second, contrary to the City's assertions at page 3 of its brief on appeal, the MPSC did not determine that "even if constitutional rights were violated, it did not matter since the MPSC's only concern and criteria are whether the pipe line was necessary and convenient." Instead, the MPSC considered and rejected the City's argument that the proposed pipeline's routing was discriminatory, stating that such arguments were "not accurate," that the residents the City seeks to protect "are not similarly situated to those persons that were located above the pipeline route proposed in the previous case," and that the City "failed to meet the burden to establish a disparate impact." (Wolverine 10/20/03 App, pp 21a-22a). The City is not challenging the MPSC's determination of this issue in this appeal.

Third, in regard to the City's argument that the administrative law judge improperly disallowed questioning about why a previously proposed pipeline route was abandoned, the

MPSC found that such questioning was improper under MRE 408 because the City sought to introduce settlement negotiations as evidence and the City offered no other proper purpose for the testimony at the time of the hearing. (Wolverine 10/20/03 App, p 13a). That determination is not on appeal with this Court.

Finally, the MPSC considered the evidence's weight and found that "approval of the application should not be denied for lack of safety in the pipeline's construction or its route." (Wolverine 10/20/03 App, p 28a). In making its determination, the MPSC concluded that (i) the pipeline will be constructed in a manner that exceeds in several respects the requirements imposed by the federal government, which is responsible for overseeing pipeline safety; (ii) its proposed safety and inspection measures demonstrate that the probability of a pipeline failure is remote; (iii) locating the pipeline in the I-96 right-of-way protects the citizenry; (iv) there will be minimal impact, if any, on the City's master plan because the pipeline will be located mainly with the I-96 highway right-of-way and that corridor is not likely to be developed beyond a highway; (v) Wolverine's environmental expert on water safety had the "more complete analysis" and, so long as Wolverine places sentinel wells in the areas identified as having a discontinuous confining layer of clay, the City's water supplies are protected; and (vi) locating the pipeline in the I-96 right-of-way reduces the likelihood that the pipeline will be affected by third-party damage. (Wolverine 10/20/03 App, pp 1a-38a). **The City is no longer challenging the MPSC's determination that the pipeline is safe and that its routing is reasonable**.

D. The Court of Appeals Decision.

The City appealed the MPSC's order to the Court of Appeals[4] arguing that: 1) the MPSC erroneously determined that it was not necessary for Wolverine to submit proof of the City's

[4] The City also requested that the Court of Appeals grant a stay pending appeal. The

consent with its Act 16 application; 2) the MPSC improperly barred evidence of settlement negotiations between Wolverine and the MPSC; 3) the MPSC's order violated the equal protection clauses of the United States and the Michigan constitutions and MCL 483.5 by discriminating against minorities; and 4) the MPSC's order violated the public interest and was not supported by substantial, material and competent evidence. (App, pp 39a-49a). In its June 5, 2003 Opinion, the Court of Appeals held that the MPSC properly determined that Wolverine need not submit with its application the consent of the affected local governments; that the MPSC properly excluded evidence of settlement discussions because the City never raised a proper evidentiary reason for the discussions' admissibility before the hearing officer; the MPSC's determination with respect to the City's equal protection claims was lawful and reasonable; and the MPSC's determination that the proposed pipeline is reasonably designed and routed is supported by competent, material, and substantial evidence. The Court of Appeals also found, however, that MCL 247.183 requires Wolverine to obtain the City's consent to construct its pipeline in the I-96 highway right-of-way. (Wolverine 10/20/03 App, p 46a). The Court of Appeals did not address whether Article 7, Section 29 of the Michigan Constitution of 1963 required local consent.[5]

Court of Appeals denied the motion for stay (App, p 52a) and a subsequent motion for reconsideration. (App, p 53a). This Court subsequently denied the City's request for leave to appeal the denial of the stay . (App, p 54a).

[5] The Court of Appeals did not address this constitutional issue. In footnote 3, the Court of Appeals stated: "[b]ecause the parties have not argued the issue below or properly briefed it on appeal, and in light of our resolution of the statutory provisions, we do not address the question whether Const 1963, art 7, § 29 mandates the 'consent' of the affected local government when a highway not owned by the local government is involved." (Wolverine 10/20/03 App, p 42a, footnote 3).

E. The Proceedings Before This Court.

Wolverine filed an application to appeal the Court of Appeals' determination that MCL 247.183 requires an interstate pipeline company to obtain local consent when it seeks to construct an interstate pipeline in an interstate highway right-of-way in order to alleviate the public's need for petroleum products. The City subsequently filed a cross-application for leave to appeal. In an order dated September 26, 2003, this Court granted Wolverine and the City leave to appeal the Court of Appeals decision. In its order, this Court directed the parties specifically to address (1) whether Wolverine is a "public utility" as that term is used in MCL 247.183; and (2) the manner and extent to which paragraphs (1) and (2) of MCL 247.183 apply to this case. (App, p 55a). Wolverine filed its brief on appeal on October 20, 2003 addressing the issue of whether it is a "public utility"[6] and how MCL 247.183 does not require local consent when an interstate pipeline company seeks to construct an interstate pipeline longitudinally within an interstate highway right-of-way for the purpose of alleviating a public need for petroleum products. This brief is submitted in response to the City's October 20 2003 Brief on Appeal.

---

[6] Wolverine addressed whether it was a "public utility" in its brief on appeal filed with this Court on October 20, 2003. Both Wolverine and the City conclude that Wolverine could be considered a "public utility" as that term is used in MCL 247.183. Wolverine further argues, however, that it is not subject to MCL 247.183(1)'s consent requirements because it is exclusively governed by MCL 247.183(2).

SUMMARY OF ARGUMENT

This case involves an interstate pipeline company's proposal to construct a 26-mile petroleum products pipeline within an interstate highway right-of-way owned and controlled by the State of Michigan through its Department of Transportation. The proposed pipeline is part of an interstate pipeline system and its purpose is to remedy inadequate pipeline capacity in the State of Michigan and to satisfy an undisputed public need for the safe and reliable transportation of sufficient quantities of petroleum products. Wolverine supplies Michigan with one-third of its petroleum needs.

Contrary to the City's assertions on appeal, Article 7, Section 29 of the Michigan Constitution of 1963 does not require an interstate pipeline company to obtain local consent when it has obtained the State of Michigan's permission to construct a segment of an interstate pipeline in an interstate highway right-of-way for the purpose of alleviating a recognized public shortage of petroleum products. To hold otherwise would contravene the Michigan's Constitution's plain language, ignore this Court's well-established limitations on a local unit of government's ability to control a highway when a matter of significant State concern is involved, and permit the City to burden interstate commerce in violation of the United States Constitution.

Likewise, MCL 247.183's plain language, legislative history, and pertinent case law demonstrate a legislative intent to facilitate, rather than impede, the placement of certain utilities within interstate highway rights-of-way, particularly where paramount State interests are involved and no significant local concerns exist. As such, MCL 247.183 cannot be used to require an interstate pipeline company to obtain local consent before placing its interstate pipeline in an interstate highway right-of-way.

Finally, no administrative rule or statutory provision requires the MPSC to withhold its Act 16 approval for a pipeline project until local consent is obtained. Therefore, the Court of

Appeals ruling that Wolverine must obtain local consent before it commences construction of its pipeline must be reversed, but its determination that local consent is not a prerequisite to Act 16 approval must be affirmed.

I. THE MICHIGAN CONSTITUTION 1963, ARTICLE 7, SECTION 29 DOES NOT REQUIRE AN INTERSTATE PIPELINE COMPANY TO OBTAIN LOCAL CONSENT WHEN IT SEEKS TO CONSTRUCT AN INTERSTATE PIPELINE IN AN INTERSTATE HIGHWAY RIGHT-OF-WAY OWNED AND CONTROLLED BY THE STATE OF MICHIGAN IN ORDER TO SATISFY A STATE RECOGNIZED PUBLIC NEED FOR PETROLEUM PRODUCTS.

A. Standard Of Review.

Wolverine concurs with the City's articulation of the applicable standard of review for issues of constitutional interpretation.

B. Article 7, Section 29 of the Michigan Constitution Does Not Require An Interstate Pipeline To Obtain Local Consent To Construct Its Interstate Pipeline In An Interstate Highway Right-Of-Way Where Paramount Issues Of State Concern Are Implicated.

Article 7, Section 29 of the Michigan Constitution of 1963 states that:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city of village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

Const 1963, art 7, § 29.

Contrary to the City's assertions, this constitutional provision does not require an interstate pipeline company like Wolverine to obtain the consent of any township, city or village when it seeks to place an interstate pipeline longitudinally within an interstate highway right-of-way for the purpose of alleviating a State recognized public need. First, I-96 is an interstate

highway and limited access highway owned and controlled by the State of Michigan through its Department of Transportation. Thus, the I-96 right-of-way is not a highway, street, alley or public place "of" the City. Second, the case law relied upon by the City in support of its argument that the Michigan Constitution requires local consent is easily distinguished since none of those cases involved an interstate highway. Third, even if it is determined that an interstate highway belongs to the City, "reasonable control" does not permit local units of government to impede important State interests. Finally, "reasonable control" does not allow local units of government to interfere with interstate commerce.

1. I-96 Is Not A Highway, Street, Alley Or Public Place "Of" The City But An Interstate Highway That Is Part Of A National Highway System With Its Longitudinal Rights-Of-Ways Under The Control Of The State Department Of Transportation.

The Michigan Constitution prohibits any public utility from using "the highways, streets, alleys or other public places *of any . . . city*" without consent. Const 1963, art 7, § 29 [emphasis added]. It also states that cities have "reasonable control of *their* highways . . . ." *Id.* In this case, an interstate pipeline company intends to build a segment of an interstate pipeline longitudinally in the I-96 highway right-of-way. That highway, however, is not a "highway" **of** the City. Instead, I-96 is an **interstate highway** constructed in accordance with federal regulations using federal aid and is a part of a National Highway System. The I-96 highway is also a limited access highway of the State of Michigan.

a. I-96 Is An Interstate Highway.

Where Michigan statutes define the term "interstate highway" in limited instances, they refer to the federal system of highways. Michigan Public Act 106 of 1972, which relates to highway advertising, defines "interstate highway" as "a highway officially designated as a part of the national system of interstate and defense highways by the [state transportation department]

and approved by the appropriate authority of the federal government." MCL 252.302(d). The statute regulates advertising that is visible from an interstate highway, freeway, or primary highway. Public Act 12 of 1967, which relates to arbitration of disputes involving interstate highway routes, defines "interstate highway" as a "highway route on the interstate system as defined in and designated pursuant to Title 23 of the United States Code . . . ." MCL 252.151(1)(d).

Highway I-96 is a "federal-aid highway" that is part of the Interstate System under federal law. Title 23 of the United States Code, which relates to highways, defines a "federal-aid highway" as "a highway eligible for assistance under this chapter other than a highway classified as a local road or rural minor collector." 23 USC 101(5). The "federal-aid system" is "any of the federal-aid highway systems described in [23 USC 103]." Under 23 USC 103, "Federal-aid systems are the Interstate System and the National Highway System." 23 USC 103(a) The National Highway System consists of the Interstate System and other highway components. 23 USC 103(b). The United States Department of Transportation designates I-96 as a part of its National Highway System and thus a federal-aid highway. (Wolverine's 11/6/03 App, p 182a). Accordingly, I-96 is an interstate highway[7].

b. <u>Interstate Highways Like I-96 Originated With The Federal Government And The Use Of Interstate Highway Rights-Of-Ways Are Regulated By State Transportation Departments Such As The Michigan Department Of Transportation.</u>

Under Title 23 of the United States Code, the federal government reimburses the states 90% of their costs if the states design and construct highways that are part of the federal Interstate Highway System and such highways comply with federal standards. Ronald C.

---

[7] The I-96 highway is even marked by red, white, and blue signs that contain the words "Interstate."

Peterson and Robert M. Kennan, Jr., *The Federal-Aid Highway Program: Administrative Procedures and Judicial Interpretation*, 2 ELR 50001 (1972). It is the duty of each "State transportation department to maintain, or cause to be maintained, any project constructed" as part of the federal interstate highway system. 23 USC 116(a).

Until 1988, the longitudinal use of interstate highway rights-of-way by utilities was allowed only by permit of the Federal Highway Administration when such use was "clearly justified due to special and unique circumstances." *Accommodation of Utilities; Longitudinal Use of Freeway Right-of-Way*, 51 Fed Reg 45479 (1986) (to be codified at 23 CFR Part 645). (Wolverine 10/20/03 App, pp 56a-69a). By the mid-1980s, however, there was "considerable interest" by telecommunications companies to install underground fiber optics cable systems under the Interstate Highway System.

Additionally, state governments were interested in leasing such rights-of-way to companies to raise additional revenue. *Accommodation of Utilities; Longitudinal Use of Freeway Right-of-Way*, 51 Fed Reg 45479 (1986) (to be codified at 23 CFR Part 645). (Wolverine 10/20/03 App, pp 56a-69a). In light of this, on February 2, 1988, Part 645 was amended to allow longitudinal utility use of interstate highway rights-of-way if that construction was permitted by the state in which it occurred and in accordance with standards approved by the Federal Highway Administration. *Accommodation of Utilities; Longitudinal Utility Use of Freeway Right-of-Way*, 53 Fed Reg 2829-01 (1988). (Wolverine 10/20/03 App, pp 70a-84a).

Under federal regulations, state transportation departments may decide whether to allow longitudinal utility installations within an interstate highway right-of-way. 23 CFR 645.209(c)(1). Each department must make such decisions and oversee such installations in accordance with a utility accommodation plan approved by the Federal Highway Administration.

Id. Once a state transportation department submits a utility accommodation plan to the Federal Highway Administration that is approved, the federal government permits the use of federal-aid highways in that state for longitudinal utility use. The utility accommodation plan submitted by the Michigan Department of Transportation was approved by the Federal Highway Administration on December 16, 1985 and a subsequent amendment was approved in 1995. The entity controlling the I-96 right-of-way in Michigan, the Michigan Department of Transportation, authorized Wolverine to construct its interstate pipeline in the I-96 right-of-way.

c. I-96 Is Also A Limited Access Highway.

Public Act 205 of 1941, MCL 252.51, *et seq.*, entirely relates to limited access highways. It defines "limited access highway" as:

> Highways as are especially designed for through traffic, and over, from or to which owners or occupants of abutting land have no easement or right of light, air or access by reason of such abuttal.[8]

Public Act 381 of 1925, which relates to super-highways[9], inter-county highways, and limited access highways uses the same definition for "limited access highway." MCL 252.2.

I-96 appears to be a limited access highway that was built by the State of Michigan in cooperation with the federal government, which has reimbursed the State of Michigan for most of the cost of construction and maintenance. The result of the project was to create an Interstate Highway that is part of the Interstate Highway System and subject the highway to federal regulations regarding interstate (or federal-aid) highways.

---

[8] MCL 252.51.

[9] A super-highway is a highway of a particular width.

d. I-96 Is An Interstate Highway And Not Part Of A Municipal System Of Streets And Is Not A Highway "Of" The City.

Public Act 51 of 1951, which relates to the State Trunk Line Highway System, directed municipalities, within 6 months of the act's effective date, to select a tentative system of major streets in each incorporated city and village and certify them to the state highway commissioner for approval. MCL 247.656. "Such tentative system of major streets shall be selected in each incorporated city and village under the direction of the governing body thereof on the basis of greatest importance to such municipality and shall not include any of the trunk line highways or county roads within the limits of such municipality." MCL 247.656. I-96 is classified as an interstate highway that is part of a National Highway System. It has no municipal designation and thus is not a highway "of" the City.

e. The Case Law Relied Upon By The City To Argue That Article 7, Section 29 Of The Michigan Constitution of 1963 Requires Local Consent Is Distinguishable From The Facts Of This Case Because It Does Not Involve An Interstate Highway.

The facts of this case are entirely different from those presented in the legal authority relied upon by the City to argue that the Michigan Constitution requires local consent. For example, in *Union Twp v City of Mt. Pleasant*, 381 Mich 82; 158 NW2d 905 (1968), a city desired to construct a water pipe within Broomfield road, an Isabella county road[10] which passes through the township. The city argued that consent was not required because the McNitt Act

---

[10] 1951 PA 51 directed the board of county road commissioners of each county, within 6 months of the act's passage, to select and designate a system of county primary roads. MCL 247.652. The tentative system of county primary roads "shall be selected on the basis of greatest general importance to the county and shall include any such county roads then legally established and existing as such within the limits of incorporated cities and villages." *Id.* The State Transportation Department reviews and approves the tentative system. *Id.* Thereafter, "so much of the tentative system of county primary roads of any county as is approved by the state transportation department shall constitute the primary road system of that county for all purposes and shall be officially known as the county primary road system of that county." *Id.*

transferred all control of township roads to the county road commissions. *Id.* at 96. The township argued that the McNitt Act transferred some control to the county road commissions, but other control, such as the regulation of county roads passing through its township, remained with the Township. This Court agreed with the Township and held that the Michigan Constitution "require[s] the county's consent as well as the township's consent in such circumstances as are presented by this case." *Id.* at 89. The *Union Twp* case did not address the situation currently before this Court-- an attempt by an interstate pipeline company to construct a segment of an interstate pipeline system in a right-of-way that is part of an interstate highway system owned and controlled by the Michigan Department of Transportation.

Other legal authority relied upon by the City is distinguishable on similar grounds. *Compton Sand & Gravel Co v Dryden Twp*, 125 Mich App 383; 336 NW2d 810 (1983), decided by the Court of Appeals, involved an application by a gravel company to obtain a mining permit from a township. In order to mine the gravel, the gravel company would need to transport gravel over Hough Road, a 22-foot wide gravel county road, for a distance of about four miles. *Id.* at 386. The *Compton Sand* case involved a township seeking control over a county road and no interstate characteristics were involved. Furthermore, the case contained no analysis of the Article 7, Section 29 of the Michigan Constitution.

Likewise, *Robinson Twp v Board of County Road Commissioners*, 114 Mich App 405; 319 NW2d 589 (1982), concerned the question of whether a township could enact a truck route ordinance without the consent of the board of county commissioners. In response to citizen complaints concerning the high volume of gravel truck traffic on certain road within the township, the township enacted an ordinance designating certain roads within its boundaries as "truck routes" and forbidding the use of other roads by certain types of trucks. *Id.* at 407. The

township sought to have the board of county road commissioners post truck route signs along designated routes, or to permit the township to do so. The board of county commissioners denied the township's request on the grounds that the McNitt Act and its successor, MCL 247.2, transferred authority over township roads to the commissioners. The township filed a declaratory judgment action against the board of commissioners to compel posting of the signs and the board of commissioners moved for summary disposition on the issue of the township's authority to enact a truck route ordinance without the board of commissioner's consent. Similar to the *Union Twp* case, the primary question presented in the *Robinson Twp* case was whether the McNitt Act divested the township of all control over its streets. *Id.* at 413. The Court of Appeals analyzed Article 7, Section 29 of the Michigan Constitution in determining that the McNitt Act did not divest total control and "the Legislature intended that, at least for some purposes, jurisdiction over its streets and roads remained with the township." *Id.* at 411-412. Again, the *Robinson Twp* case did not address the question of whether an interstate pipeline company can construct a segment of an interstate pipeline system in a right-of-way that is part of an interstate highway system owned and controlled by the Michigan Department of Transportation without obtaining local consent.

In *City of Niles v Michigan Gas & Electric Co*, 273 Mich 255; 262 NW 900 (1935), also relied upon by the City in support of its consent argument, a city adopted an ordinance granting a 30-year franchise to a gas company to manufacture and sell gas to the city and its citizens, and to use the streets and public grounds to accomplish that purpose. The ordinance, which was approved by a vote of the electors, also set forth the applicable rate to be charged. On two subsequent occasions the city council, through ordinances and a resolution not submitted to popular vote, authorized rate increases. The city eventually sued to set aside the subsequent

ordinances and resolution and to restore the first gas rate and to enjoin the gas company from discontinuing service on refusal to pay a greater rate. One of the issues on appeal was whether the constitutional provision giving municipalities power of control over streets, alleys, and public places delegated to municipalities the power to fix rates for public utilities. The case did not concern the issue of whether local consent is required when an interstate pipeline company seeks to construct a portion of an interstate pipeline in an interstate highway right-of-way.

2. This Court Has Repeatedly Held That Paramount State Interests Override Mere Local Concerns.

Wolverine's pipeline supplies Michigan with approximately **one-third** of its petroleum needs. Almost three years ago the State of Michigan determined that the public needs this pipeline so sufficient quantities of petroleum can be delivered to Michigan in a safe and reliable manner. This Court has previously recognized limitations on a local unit of government's ability to control certain highways under Article 7, Section 29 of the Michigan Constitution, particularly when a matter of State concern is involved. For example, in *Allen v Rogers*, 246 Mich 501; 224 NW 632 (1929), the State Highway Commission determined that it was necessary for the State of Michigan to condemn private property in order to widen a state trunk line road (Grand River), a portion of which ran through the City of Detroit's corporate limits. The City of Detroit argued in part that the Michigan Constitution prohibited the State from widening the city streets. The City of Detroit first relied upon Article 8, Section 28 of the 1908 Constitution that provided "The Legislature shall not vacate nor alter any road laid out by commissioners of highways, or any street, alley or public ground in any city or village or in any recorded town plant." In examining this provision, this Court held that "Grand River avenue is not a city street in the constitutional sense, and therefore its improvement by the state, which requires the taking of private property for that purpose, is not forbidden by section 27, art. 8 of the 1908 Constitution of Michigan." *Id.*

at 508. This Court also noted that "**a state trunk line road running through a city is not a matter of purely local concern, but is for the benefit of the people of the entire state.**" *Id.* [emphasis added]. The City of Detroit's reliance on Article 8, Section 27 of the 1908 Michigan Constitution, which is the predecessor to Article 7, Section 29 of the 1963 Michigan Constitution, was also held to be misplaced. The City argued that Article 8, Section 27 of the 1908 Constitution gave it exclusive control of its streets and that the State was precluded from assuming any control over them. Article 8, Section 27 read: "The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships." *Id.* In holding that the State was not precluded from improving the trunk line road, this Court stated:

> This section [section 27, art 8] was construed by the court in People v. McGraw, 184 Mich 233, 150 N.W. 836. After quoting from the proceedings and debates of the constitutional convention, it was said: '**From this, and also from reading the debates with reference to the insertion of the word 'reasonable,' it is clear that it was not the intention of the framers of the Constitution to deprive absolutely the state itself of control over its highways and bridges in the cities, villages, and townships * * * In other words, the municipality retains reasonable control of its highways, which is such control as cannot be said to be unreasonable and inconsistent with regulations which have been established, or may be established, by the state itself with reference thereto**.'
>
> The state is committed to a comprehensive system of highway development which requires that it should extend its trunk line roads through cities. The Legislature has undertaken to bring this about by providing for co-operation between the cities and the highway department. Co-operation by the cities is not compulsory, but the proposition is made so attractive that, for financial reasons and for the general public good, cities are willing to co-operate. This they may do without relinquishing their constitutional right to a reasonable control of their streets.

Id. at 508-509 [emphasis added].

In 1939, this Court again emphasized the State of Michigan's authority to override local concerns to promote state interests along state highways. In *Case v City of Saginaw*, 291 Mich 130; 288 NW 357 (1939), private property owners attempted to prevent the construction of a bridge within Saginaw city limits along a state trunk line highway. The Court again recognized the state's authority to override local concerns to promote state interests along state highways. After extensively quoting the *Allen v Rogers* opinion, this Court stated "**The fact that we have already determined herein that Court street is part of a State trunkline highway, obviously diminishes the force of plaintiffs' argument with regard to the above-mentioned constitutional provisions**." *Id.* at 149 [emphasis added]. The Court concluded that the bridge could be constructed.

Likewise, in *Allen v Ziegler*, 338 Mich 407; 61 NW2d 625 (1953), the state transportation commissioner prohibited parking along a state trunkline highway. In rejecting an attempt by a city to enjoin that traffic order within its city limits, the Court stated:

> The State by the establishment of a trunk line highway which includes the street in question in [the city] thereby assumed **an obligation to the people of the state in general** to see to it that the street in question, together with the trunk line in general, is so maintained and controlled as to be reasonably available for the flow of traffic.

Id. at 416 [emphasis added]. The Court recognized, accordingly, that the state's authority over a state highway will override a city's mere local concern to promote a purpose of statewide interest.

In *Jones v City of Ypsilanti*, 26 Mich App 574; 182 NW2d 795 (1971), a woman sustained an injury on a sidewalk abutting a state trunk line highway and sued the city in which she was injured. The Court of Appeals rejected the city's argument that the state maintains those sidewalks, stating:

> **Municipalities were meant to retain reasonable control over state trunkline highways located within their boundaries so long as that control pertains to local concerns and does not conflict with the paramount jurisdiction of the state highway commission**.

Id. at 580 [emphasis added].

As has been recognized, the State of Michigan's authority is "paramount" over issues related to state highways that are broader than "mere issues of local concern." In this case **there are no issues of local concern since the MPSC's findings of safety and reasonableness of routing were affirmed by the Court of Appeals** and the City did not appeal that portion of the Court of Appeals decision. Moreover, Wolverine's proposed pipeline will run for 26 miles, almost entirely within an interstate highway, to bring greater gasoline supply safely to a large portion of the state. Wolverine has obtained approvals for the project from the Michigan Department of Transportation, the Michigan Department of Environmental Quality, the Michigan Public Service Commission, and the Office of Pipeline Safety of the United States Department of Transportation. It is undisputed in this case that the State of Michigan has an insufficient supply of petroleum since the Total/UDS refinery in Alma, Michigan closed. It is also undisputed in this case that public safety is substantially increased when petroleum product is transported via pipeline instead of by truck. Thus the State's interests in having this interstate pipeline built in an interstate highway right-of-way is equal to or greater than those interests previously found by this Court to not require local consent.

3. Requiring Local Consent Over An Interstate Pipeline In An Interstate Highway Right-Of-Way Would Violate The Commerce Clause Of The United States Constitution.

Pursuant to Article I, Section 8, clause 3 of the United States Constitution, Congress is granted the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." The Commerce Clause serves as "both a limitation on state

regulatory powers and an affirmative grant of congressional authority." 15A Am Jur 2d *Commerce* § 1 (2003). While the power granted to Congress under the Commerce Clause is not exclusive, it is broad, and the Clause limits the states' power to interfere with interstate commercial activities. As this Court has previously recognized:

> The Commerce Clause gives to the Congress a power over interstate commerce which is both paramount and broad in scope. But due regard for state legislative functions has long required that this power be treated as not exclusive. It is now well settled that a state may regulate matters of local concern over which federal authority has not been exercised, even though the regulation has some impact on interstate commerce. The only requirements consistently recognized have been that the regulation not discriminate against or place an embargo in interstate commerce, that it safeguard an obvious state interest, and that the local interest at stake outweigh whatever national interest there might be in the prevention of state restrictions. *People v Asta*, 337 Mich 590, 608; 60 NW2d 472 (1953) (quoting *Cities Service Gas Co v Peerless Oil & Gas Co*, 340 US 179, 186-87; 71 S Ct 215; 95 L Ed 190 (1950)) (citations omitted).

Commerce Clause considerations apply equally to municipal action as they do to state action – like the states, local government entities also may not improperly interfere with interstate commerce. *See Dean Milk Co v City of Madison*, 340 US 349, 353; 71 S Ct 295; 95 L Ed 329 (1951).

State or local regulation may burden interstate commerce either directly or indirectly. State action directly burdens interstate commerce where it discriminates against interstate commerce "either on its face or in practical effect," treating interstate actors differently from intrastate actors. *Hughes v Oklahoma*, 441 US 322, 336; 99 S Ct 1727; 60 L Ed 2d 250 (1979). This type of regulation is closely scrutinized by the courts, and will be struck down if the state fails to demonstrate that its statute "'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Maine v Taylor*, 477 US 131, 138; 106 S Ct 2440; 91 L Ed 2d 110 (1986) (quoting *Hughes*, *supra* at 336). State

regulation that does not affirmatively discriminate against interstate commerce also may violate the Commerce Clause. In *Pike v Bruce Church, Inc*, 397 US 137, 142; 90 S Ct 844; 25 L Ed 2d 174 (1970), the United States Supreme Court stated:

> Where the [state or local] statute regulated even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

States and local units of government thus may regulate interstate commerce in accordance with their general police powers to protect the welfare, health, morals, and safety of their citizens, but such regulation must not impose a burden on interstate commerce that is "clearly excessive" in relation to the claimed local benefits. *Westlake Transportation Inc v Michigan Public Service Comm*, 255 Mich App 589, 621-22; 662 NW2d 784 (2003).

The City must exercise its statutory and constitutional authority in a manner consistent with the Commerce Clause. The Commerce Clause will prohibit the City from blocking Wolverine's planned construction of the pipeline if (1) the pipeline operates in interstate commerce, and (2) the City's refusal to permit construction of the pipeline in the I-96 right-of-way would constitute a clearly excessive burden on interstate commerce.

a. <u>Wolverine's Pipeline Operates In Interstate Commerce.</u>

In determining whether Wolverine's pipeline operates in interstate commerce, this Court must interpret the terms of the Commerce Clause with great "elasticity," in order "to meet the ever expanding and increasingly complicated conditions of commerce." *Tennessee Gas Transmission Co v Thatcher*, 84 F Supp 344, 345 (WD La 1949).

> As has been said, interstate commerce may be compared, in dealings between the states and their citizens, to the circulation of blood in the human body, upon which the life of the nation depends. It is true that in the early stages, Congress and the courts had to deal with conditions as they then existed. At first intercourse was mainly upon the navigable waters of the country; later came the railroads, followed by hard surfaced highways, bridges, etc., and now the airways, **underground pipelines**, etc.

Id. at 345-46 [emphasis added]. The Wolverine pipeline will be part of a vast system of interconnected pipelines that stretches across several states. While the portion at issue in this case is located solely within the State of Michigan, the pipeline is an instrumentality of interstate commerce, since it will be used to transport petroleum products between different states. *United States v Ohio Oil Co*, 234 US 548, 560; 34 S Ct 956; 58 L Ed 1459 (1914); *Gibbons v Ogden*, 22 US 1, 194 (9 Wheat 1) (1824) (finding that the phrase "among the several States" in the Commerce Clause refers to "that commerce which concerns more States than one"); *see also Panhandle Eastern Pipe Line Co v Michigan Public Service Comm*, 341 US 329, 333; 71 S Ct 777; 95 L Ed 993 (1951).

b. <u>The City's Refusal To Permit Construction Of The Pipeline Would Constitute A Clearly Excessive Burden On Interstate Commerce And Be Unreasonable.</u>

Since Wolverine's pipeline operates in interstate commerce, the City may refuse to permit construction of the pipeline only if such refusal does not constitute an excessive burden on interstate commerce. A regulation constitutes an excessive or undue burden on interstate commerce where it "impede[s] the free flow of commerce." *Indiana & Michigan Power Co v Michigan*, 405 Mich 400, 416; 275 NW2d 450 (1979); *see also Panhandle Eastern Pipe Line Co v Public Utilities Comm*, 56 Ohio St 2d 334, 339; 383 NE2d 1163 (1978) (finding that a burden is excessive or undue where it "may seriously interfere with or 'impede substantially' the free flow of commerce between the states"). In this case, the City's refusal to consent to Wolverine's

construction of the pipeline (assuming that such consent is required) could clearly impede the free flow of interstate commerce.

To withstand scrutiny under the Commerce Clause, the City's refusal to permit construction of the pipeline must be "reasonably related to the necessity for protecting the local interests on which [its police] power rests." *Panhandle Eastern Pipe Line Co v Public Service Comm of Indiana*, 332 US 507, 523; 68 S Ct 190; 92 L Ed 128 (1947). The City has failed to demonstrate that denial of its consent for construction of the pipeline would be reasonably related to protecting local interests. Wolverine has already demonstrated to the MPSC that the proposed pipeline route is reasonable and that the pipeline will be constructed pursuant to the required safety standards. In fact, Wolverine has presented considerable evidence in this case that the proposed pipeline route is substantially safer than any alternative route proposed by the City. **The City cannot demonstrate a reasonable basis for its efforts to block construction of the pipeline and has, in fact, conceded to the MPSC's funding of public need safety and reasonableness**.

The case of *Transcontinental Gas Pipe Line Corp v Borough of Milltown*, 93 F Supp 287 (D NJ 1950) is closely analogous to the case presented here. In *Transcontinental*, a municipal government attempted to restrain a pipeline corporation from constructing a natural gas pipe line through the municipality. The municipality argued that the corporation should be required to comply with its zoning ordinances, and argued that the corporation should be required to use one of four alternative routes for the pipeline that substantially avoided the boundaries of the municipality. *Id.* at 292. As in this case, the municipality in *Transcontinental* failed to present persuasive evidence that the proposed location of the pipe line presented an unreasonable safety hazard, or that the location would be inconvenient or aesthetically displeasing, as it would be

buried underground. The court thus found that "an objection based merely on the ground that some other location might have been chosen or that other available property is suitable for the purpose will not be sustained." *Id.* The city's attempt to impose its zoning ordinance to prohibit Transcontinental from constructing its pipe line was held to be "unreasonable, arbitrary, and without foundation or justification in the health, safety and welfare of the citizens of the [municipality]" and as such constituted an impermissible undue burden upon interstate commerce. *Id.* at 295. Since the City in this case also has failed to demonstrate that Wolverine's pipeline will present an unreasonable safety hazard, any attempt to block the pipeline will interfere with Wolverine's participation in interstate commerce and is unreasonable.

II. MCL 247.183 DOES NOT REQUIRE AN INTERSTATE PIPELINE COMPANY TO OBTAIN LOCAL CONSENT FOR THE CONSTRUCTION OF AN INTERSTATE PIPELINE SEGMENT WITH AN INTERSTATE HIGHWAY'S RIGHT-OF-WAY FOR THE PURPOSE OF SATISFYING A RECOGNIZED PUBLIC NEED.

A. Standard Of Review

Wolverine concurs with the City's articulation of the applicable standard of review for issues of statutory interpretation.

B. The Plain Language And Structure Of MCL 247.183 Shows That Wolverine May Install Its Proposed Pipeline In The I-96 Rights-Of-Way Without Consent From The City Of Lansing.

MCL 247.183 states in pertinent part as follows:

> (1) Telegraph, telephone, power, and other public utility companies, cable television companies, and municipalities may enter upon, construct, and maintain telegraph, telephone, or power lines, pipe lines, wires, cables, poles, conduits, sewers or similar structures upon, over, across, or under any public road, bridge, street, or public place, including, subject to subsection (2), longitudinally within limited access highway rights-of-way, and across or under any of the waters in this state, with all necessary erections and fixtures for that purpose. A telegraph, telephone, power, and other public utility company, cable television company, and municipality, before any of this work is commenced, shall first

> obtain the consent of the governing body of the city, village, or township through or along which these lines and poles are to be constructed and maintained.
>
> (2) A utility as defined in 23 C.F.R. 645.105 (m) may enter upon, construct and maintain utility lines and structures longitudinally within limited access highway rights-of-way in accordance with standards approved by the state transportation commission that conform to governing federal laws and regulations . . . . The standards may provide for the imposition of a reasonable charge for longitudinal use of limited access highway rights-of-way . . . . The charge shall be calculated to reflect a 1-time installation permit fee of $5,000 per permit . . .

MCL 247.183 (1)-(2). The City argues that this statutory language requires Wolverine to obtain consent from the City and other localities because the words "subject to subsection (2)" in the first sentence of subsection (1) subjects Wolverine to both subsections (1) and (2). The City argues at pages 27 and 28 of its Brief on Appeal that subsection (2) of MCL 247.183 imposes "further requirements" on those utilities that satisfy the definition of 23 CFR 645.105(m) because "the legislature did not want to jeopardize the funding it receives for these highways by allowing utilities to construct projects in them that would make the state ineligible for these federal fund" and thus "the legislature solved this problem by including a subsection that required utilities seeking to use these rights-of-ways to meet federal standards." This argument is an unreasonable interpretation of the statute's plain language and legislative history, however.

1. MCL 247.183's Plain Language Does Not Require Consent.

The parties are in agreement that subsection (2) of MCL 247.183 contains no consent requirement. Instead, that subsection plainly states that "[a] utility as defined in 23 CFR 645.105 (m) may enter upon, construct and maintain utility lines and structures longitudinally within limited access highway rights-of-way." MCL 247.183(2). A "utility" is defined in 23 CFR 645.105(m) as follows:

> Utility – a privately, publicly, or cooperatively owned *line, facility or system* for producing, transmitting, or *distributing* communications, cable television, power, electricity, light, heat, gas, *oil, crude products*, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system, which directly or indirectly serves the public. The term utility shall also mean the utility *company* inclusive of any wholly owned or controlled subsidiary. [emphasis added].

It is undisputed that Wolverine is a "utility" under 23 CFR 645.105(m). (Wolverine 10/20/03 App, p 45a-46a). It also is undisputed that Wolverine seeks to install its pipeline in the I-96 rights-of-way, which is a limited access highway rights-of-way.

Subsection (2) unambiguously and independently enables a "utility" under 23 CFR 645.105 (m) to install facilities longitudinally in limited access highways without local consent. The only local consent requirement in MCL 247.183 is found in subsection (1) of MCL 247.183. Subsection (1) authorizes certain entities to install facilities on public roads, including highway rights-of-way, subject to local consent. However, there is an explicit exception to the subsection (1) requirements for entities falling within the federal "utility" definition who desire to construct infrastructure longitudinally within limited access highway rights-of-way.

In arguing that an interstate pipeline seeking to construct a pipeline within an interstate right of way is subject to both subsections (1) and (2) of MCL 247.183, the City focuses only on the definition of the word "including" in finding that subsection (1) bootstraps subsection (2) utilities into its requirements. Such an interpretation overlooks the import of the words "subject to subsection (2)" immediately following the word "including." The word "subject" means to be "under the domination, control, or influence of something (often fol. by *to*)" or "being under the domination, rule, or authority of" another." *Random House Webster's College Dictionary* (2001). The local consent requirement contained in the last sentence of subsection (1) does not apply to entities fitting the subsection (2) definition of "utility" because such entities and projects

are under the control of the requirements and conditions in subsection (2). Adopting the City's interpretation of MCL 247.183 (1) would render the words "subject to subsection (2)" nugatory. Moreover, if the Legislature wanted subsection (1) to impose both the local consent requirement in subsection (1) and the requirements of subsection (2) on the same utility project, it could have easily left out the words "subject to subsection (2)" and begun subsection (2) by stating that "a utility installing facilities longitudinally in limited access highway rights of way also shall . . . ." It, however, did not. Instead, it used the words "subject to subsection (2)", to demonstrate its intent that federally-defined utilities engaging in longitudinal construction in limited access highways must only comply with subsection (2)'s requirements.

The *in pari materia* rule further supports Wolverine's interpretation. *Jennings v Southwood*, 446 Mich 125, 136-37; 521 NW2d 230 (1994). Not only is subsection (2) more recent than subsection (1), having been created by the 1989 amendment, but it also is more specific. Subsection (1) deals with the construction of any type of structure, in any fashion, "upon, over, across, or under any public road, bridge, street, or public place . . . ." MCL 247.183 (1) [emphasis added]. Subsection (2), in contrast, is far more specific – its deals only with longitudinal construction and only within limited-access highway rights-of-way. Subsection (2) also makes clear that a company that is a utility as defined in 23 CFR 645.105(m) may conduct such work so long as it acts "in accordance with standards approved by the state transportation commission that conform to governing federal laws and regulations." MCL 247.183(2).

The symmetrical structure of subsections (1) and (2), moreover, demonstrates that subsection (2) is not merely an extension or component of subsection (1). Subsection (1) states, for example, that a "public utility company" may "enter upon, construct, and maintain" facilities in certain locations in accordance with certain specific conditions. Subsection (2) states that a

federally-defined "utility" may "enter upon, construct and maintain" facilities in certain locations in accordance with certain conditions. Each subsection, on its own, enables a certain entity to engage in certain projects under certain conditions. Rather than merely adding to subsection (1), therefore, subsection (2) stands on its own to define the requirements for federally-defined utilities engaging in longitudinal construction in limited access highway rights-of-way. It imposes, moreover, no local consent requirement on subsection (2) utilities.

This point is buttressed by the fact that not all entities defined as a "utility" under 23 CFR 645.105 (m) could be a "public utility company" under MCL 247.183 (1). Under subsection (2), for example, a "utility" under 23 CFR 645.105(m) includes "a fire or police signal system" or a "street lighting system." 23 CFR 645.105. Such systems do not fit within the meaning of a "telephone" or "power" or similar traditional "public utility company" referenced under subsection (1). The Legislature did not intend subsection (2), therefore, merely as an add on to the requirements set forth in subsection (1).

Finally, interpreting subsection (2) to impose mere additional requirements would mean that sections (1) and (2) are redundant contrary to well-established principles that "it is important to ensure that words in a statute not be ignored, treated as surplusage, or rendered nugatory." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002). Subsection (1) provides in pertinent part that:

> [t]elegraph, telephone, power, and other public utility companies . . . ***may enter upon, construct, and maintain*** [facilities in certain locations], including, subject to subsection (2), longitudinally within limited access highway rights-of-way . . . .

MCL 247.183 (1) [emphasis added]. Subsection (2) states that:

> A utility as defined in 23 C.F.R. 645.105 (m) ***may enter upon, construct, and maintain*** utility lines and structures longitudinally within limited access highway rights-of-way in accordance with

> standards approved by the state transportation commission that conform to governing federal laws and regulations.

MCL 247.183 (2) [emphasis added]. The Legislature chose to define the class of entities to which subsection (2) relates differently than those to which subsection (1) relates. At the same time, it began each subsection with basically the same enabling language, *i.e.* "may enter upon, construct and maintain . . . ." To avoid rendering that language in each subsection redundant, this Court must conclude that subsection (2) is more than a mere extension of subsection (1). Instead, it was enacted by the Legislature separately from subsection (1) to set forth the requirements applicable to longitudinal construction in limited access highway rights-of-way. Those conditions contain no local consent requirement.

For the reasons discuss above, the plain language and structure of MCL 247.183 shows that it enables Wolverine to install its pipeline in the I-96 rights-of-way without obtaining consent from the City of Lansing and other localities through which the pipeline would run.

2. The Apparent Purpose And Legislative History Of MCL 247.183 Further Demonstrate That Wolverine Need Not Obtain The City's Consent To Construct Its Pipeline In The I-96 Rights-Of-Way.

To the extent MCL 247.183 does not plainly allow Wolverine to construct its pipeline in the I-96 rights-of-way without local consent, the statute is ambiguous and this Court may "recur to the history of when it was passed and of the act itself in order to ascertain the reason as well as the meaning of its provisions . . . ." *People v Hall*, 381 Mich 175, 191; 215 NW2d 166 (1974). Moreover, this Court "may also consider all conditions and circumstances surrounding its enactment in the light of the general policy of previous legislation on the same subject." *Id.* "When determining legislative intent, statutory language should be given a reasonable construction considering its purpose and the object sought to be accomplished." *Lorencz v Ford Motor Co*, 439 Mich 370, 377; 483 NW2d 844 (1992).

The City claims that subsection (2) of MCL 247.183 imposes "further requirements" on those utilities that satisfy the definition of 23 CFR 645.105(m) because "the legislature did not want to jeopardize the funding it receives for these highways by allowing utilities to construct projects in them that would make the state ineligible for these federal fund" and thus "the legislature solved this problem by including a subsection that required utilities seeking to use these rights-of-ways to meet federal standards." This argument is wholly without support[11] and is in fact contradicted by the history surrounding federal highway regulations and the statute's own legislative history. The development of federal regulations regarding longitudinal utility construction in interstate highway rights-of-way and the related legislative history of MCL 247.183 demonstrate that the Legislature intended to enable federally-defined "utilities" such as Wolverine to longitudinally use interstate highways such as I-96 with permission from the state in accordance with federal regulations. The Legislature did not intend to force such utilities to first obtain the consent of numerous local governments such as the City.

a. The Federal Accommodation Of Public Utilities In Highway Rights-Of-Ways.

Under Title 23, Part 645 ("Part 645") of the Code of Federal Regulations, the Federal Highway Administration regulates the use of rights-of-ways by utilities in Federal-aid highways, such as interstate highways like I-96. The definition of "utility" in 23 CFR 645.105 is contained in those provisions.

Until 1988, the longitudinal use of interstate highway rights-of-way were allowed only under special and unique circumstances. *Accommodation of Utilities; Longitudinal Use of Freeway Right-of-Way*, 51 Fed Reg 45479 (1986) (to be codified at 23 CFR Part 645).

[11] The fact that this argument is without support is best evidenced by the City's failure to cite any legal authority on this point.

(Wolverine 10/20/03 App, pp 56a-69a). Because telecommunications companies wished to install underground fiber optics cable systems under the Interstate highway system and state governments desired to lease the rights-of-ways to raise revenue, Part 645 was amended in February 1988 to allow longitudinal utility use of interstate highway rights-of-way if that construction was permitted by the state in which it occurred and in accordance with standards approved by the Federal Highway Administration. *Accommodation of Utilities; Longitudinal Use of Freeway Right-of-Way*, 51 Fed Reg 45479 (1986) (to be codified at 23 CFR Part 645) *Accommodation of Utilities; Longitudinal Utility Use of Freeway Right-of-Way*, 53 Fed Reg 2829-01 (1988); 23 CFR Part 645. (Wolverine 10/20/03 app, pp 56a-84a). The utility accommodation plan submitted by the Michigan Department of Transportation was approved by the Federal Highway Administration on December 16, 1985 and a subsequent amendment was approved in 1995.[12]

b. <u>The State Of Michigan's Accommodation Of Utilities In Highways Under Section 13 Of Michigan Public Act 368 Of 1925, As Amended.</u>

The legislative history surrounding MCL 247.183 also shows an intent to facilitate the construction of utilities in highway rights-of-ways. As originally enacted in 1925, MCL 247.183 (1925 PA 368) contained no provision regarding the longitudinal construction in limited access highway rights-of-way. *See* 1925 PA 368 (Eff Aug 27, 1925). (Wolverine 10/20/03 App, pp 85a-90a). In 1972, the statute was amended to add cable television companies to the category of "public utility companies" addressed by 1925 PA 368. Otherwise, the statute remained unchanged. 1972 PA 268 (Eff Oct 11, 1972). (Wolverine 10/20/03 App, pp 91a-93a).

---

[12] Wolverine has obtained a permit from the Michigan Department of Transportation to construct its pipeline.

In 1989, only a year after the federal government took affirmative action to make it easier for telecommunications companies to install underground fiber optics cable systems under the Interstate highway system and to facilitate the states' lease of such rights-of-ways as a revenue raising mechanism, the Michigan Legislature amended MCL 247.183 to address a utilities' longitudinal use of limited access highway rights-of-way. At that time, the Legislature inserted the phrase "except longitudinally within limited access highway rights of way" into MCL 247.183 and added subsection (2). As it originally was introduced in the Legislature in 1989, MCL 247.183 (2) would have allowed "any person" to install facilities in limited access highway rights-of-way. *See* HB 4767, introduced May 3, 1989. (Wolverine 10/20/03 App, pp 94a-95a) The statute was ultimately enacted to accommodate federally defined "utilities" under Title 23, Part 645 of the Code of Federal Regulations, however. MCL 247.183(2). Further, to address the states need to lease interstate highway rights-of-ways for raise revenue, the Michigan Legislature enacted language authorizing "the imposition of a reasonable charge" for longitudinal use of limited access highways. *Id.* The best indication of the Legislature's intent to assure that local control did not interfere with the State's interests is demonstrated in the Senate Fiscal Agency Legislative Analysis of HB 4767 (October 11, 1989) that states "The bill would amend Public Act 365 of 1925 which regulates the use of highways by utility companies to authorize the Department of Transportation, rather than local governing bodies, to permit the longitudinal construction of utility lines and structures within limited access highway rights-of-ways. . . .The bill would create an exception to this provision for longitudinal construction within limited access highway rights-of-way." (Wolverine 10/20/03 App, pp 100a).

In 1994, the Legislature revised MCL 247.183 (2) to define the amount that the state transportation department could charge to lease limited access highway rights-of-way to utilities. Specifically, it added language stating that a "reasonable charge" for such access could:

> not exceed $1,000.00 per mile of longitudinal use of limited access highway rights-of-way with a minimum fee of $5,000.00 per permit.

MCL 284.183(2). That amendment also changed the word "except" to "including, subject to subsection (2)" in MCL 247.183 (1).

The sole substantive aim of the 1994 amendment appears to have been promoting economic development by limiting the lease fees the statute could charge utilities seeking to deploy facilities longitudinally in limited access highway rights-of-way:

> In recent years, the Federal government has granted states the authority to lease rights-of-way on limited access highways for purposes of utility line construction and maintenance. The Michigan Transportation Commission's policy for leasing these rights-of-way sets an annual lease fee for $1,600 per mile in rural areas and $3,200 per mile in urban areas; no leases for rights-of-way on limited access highways currently are in place . . . . Although limited access highways often would provide the most efficient route for a utility line, the cost of leasing that land under the Commission's current policy may be prohibitive.

Senate Fiscal Agency Analysis of SB 1008 (August 3, 1994). (Wolverine 10/20/03 App, p 101a). As enacted, the 1994 amendment limited the lease rates the state could charge. It would make little sense to conclude that while the Legislature limited lease fees to promote access to limited access highways, at the same time it hindered such access by subjecting it to the veto of every local community through which a project along a highway might pass.

Moreover, no legislative history on the 1994 amendment makes any mention of the change in terminology in subsection from (1) from "except longitudinally within limited access highway rights-of-way" to "including, subject to subsection (2), longitudinally within limited

access highway rights-of-way...."). Presumably, had the Legislature in enacting the 1994 amendment intended such a significant increase in municipal powers, there would be *some* reference in the legislative history to that effect. There is none.

The federal scheme and the legislative history of MCL 247.183, supports the conclusion that only subsection (2) sets forth the requirements applicable to longitudinal construction in a limited access highway by a utility such as Wolverine. Those requirements do not include obtaining City consent.

3. Wolverine's Interpretation Is Consistent With Case Law Recognizing That Paramount State Interests Trump Mere Local Concerns And The Interpretation Also Avoids Burdening Interstate Commerce.

Interpreting MCL 247.183 to not require consent when an interstate pipeline company seeks to construct an interstate pipeline in an interstate highway right-of-way for the purpose of alleviating a State recognized need for petroleum is consistent with this Court's previously recognized limitations on a local unit of government's ability to interfere with State interests, particularly as it relates to the State's control over its highways Subsection (2) of MCL 247.183 inherently recognizes the state's paramount jurisdiction where a federally-defined utility constructs a facility longitudinally along an interstate highway. The types of projects contemplated in subsection (2) are generally federal in nature and implicate broader statewide concerns. Likewise, interpreting MCL 247.183 to not require consent avoids the possibility that local action burdens interstate commerce as discussed above.

Accordingly, the Court of Appeals decision holding that an interstate pipeline company must acquire local consent when it seeks to construct an interstate pipeline in an interstate highway right-of-way must be reversed.

III. EVEN ASSUMING CITY CONSENT IS REQUIRED (WHICH IT IS NOT), THE MPSC AND COURT OF APPEALS PROPERLY DETERMINED THAT NO CONSENT NEED ACCOMPANY AN ACT 16 APPLICATION.

A. Standard Of Review.

The standard of review for MPSC orders is narrow. Michigan statutory law provides that all rates, fares, practices and services prescribed by the MPSC are presumed *prima facie* lawful and reasonable. MCL 462.25. *See also Michigan Consolidated Gas Co v Public Service Commission*, 389 Mich 624, 636; 209 NW2d 210 (1973); *Attorney General v Public Service Commission*, 206 Mich App 290, 294; 520 NW2d 636 (1994) An appellant must show "by clear and satisfactory evidence" that the MPSC order complained of is "unlawful" or "unreasonable." MCL 462.26(8); *Michigan Consolidated Gas Co*, *supra* at 639; *CMS Energy Corp v Attorney General*, 190 Mich App 220, 228; 475 NW2d 451 (1991). The term "unlawful" has been defined as an erroneous interpretation or application of the law, and the term "unreasonable" has been defined as unsupported by the evidence. *City of Marshall v Consumers Power Co*, 206 Mich App 666, 676; 523 NW2d 483 (1994). Moreover, Const. 1963, Article 6, Section 28 also applies, and provides that a final agency order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. Courts apply principles of statutory construction in construing administrative rules, and the language of a statue is to be construed according to its plain meaning. An agency's interpretation of its own rules is entitled to deference. *Reiss v Pepsi Cola Metropolitan Bottling Company*, 249 Mich App 631, 638; 643 NW2d 271 (2002); *Thomas Township v John Sexton Corp*, 173 Mich App 507, 514; 434 NW2d 644 (1988); *Sibel v State Police*, 154 Mich App 462, 465; 397 NW2d 828 (1986).

B. Rule 601 Does Not Require An Act 16 Application To Contain Local Consent.

The City claims that the MPSC and Court of Appeals committed reversible error by not requiring Wolverine to submit a franchise or consent with its application. The City's argument rests on Rule 601(2)(d) of the Commission's Rules of Practice and Procedure, R 460.17601 (2)(d) ("Rule 601") which states:

> R 460.17601 Public utilities; new construction
>
> Rule 601. (1) An entity listed in this subrule shall file and application with the commission for the necessary authority to do the following:
>
> (a) A gas or electric utility within the meaning of the provisions of Act No. 69 of the Public Acts of 1929, as amended, being § 460.501 et seq. of the Michigan Compiled Laws, that wants to construct a plant, equipment, property or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.
>
> (b) A natural gas pipeline company within the meaning of the provisions of Act No. 9 of the Public Acts of 1929, as amended, being § 483.101 et seq. of the Michigan Compiled Laws, that wants to construct a plant, equipment, property or facility for furnishing public utility service for which a certificate of public convenience and necessity is required by statute.
>
> **(c) A corporation, association, or person conducting oil pipeline operations within the meaning of the provisions of Act No. 16 of the Public Acts of 1929, being § 483.1 et seq. of the Michigan Compiled Laws, that wants to construct facilities to transport crude oil or petroleum or any crude oil or petroleum products as a common carrier for which approval is required by statute.**
>
> (2) The application required in subrule (1) of this rule shall set forth, or by attached exhibits show, all of the following information:
>
> (a) The name and address of the applicant.
>
> (b) The city, village or township affected.
>
> (c) The nature of the utility service to be furnished.
>
> (d) **The municipality from which the appropriate franchise or consent has been obtained, if required, together with a true copy of the franchise or consent.**

(e) A full description of the proposed new construction or extension, including the manner in which it will be constructed.

(f) The names of all utilities rendering the same type of service with which the proposed new construction or extension is likely to compete.

(3) A utility that is classified as a respondent pursuant to the provisions of R 460.17101 may participate as a party to the application proceeding without filing a petition to intervene. It may file an answer or other response to the application.

R 460.17601 [emphasis added].

A careful review of Rule 601 confirms that the MPSC's ruling on this issue was correct. Rule 601 applies to "Public utilities; new construction" and requires three different types of entities to file applications with the MPSC: (1) gas or electric utilities seeking approval under 1929 PA 69, MCL 460.501 *et seq.* ("Act 69"); (2) a natural gas pipeline company seeking approval under 1929 PA 9, MCL 483.101 *et seq.* ("Act 9"); and (3) a corporation, association, or person conducting oil pipeline operations seeking approval under Act 16. Wolverine was seeking Act 16 approval from the MPSC. Thus, the relevant question is whether Act 16 requires consents to be attached to an Act 16 application.

Nowhere in Act 16's language is there any requirement that an applicant include a franchise or other equivalent consent before Act 16 approval can be granted. Thus, when Rule 601(2)(d) references a showing of "the appropriate franchise or consent [having] been obtained, if required", it is not referring to an Act 16 application since that statute does not require any showing that the applicant "has secured the necessary franchise or consent."

Likewise, Act 9 does not include specific franchise or consent requirements which must be satisfied prior to filing the application for Act 9 authority. Thus, when Rule 601 (2)(d) references a showing of "the appropriate franchise or consent [having] been obtained, if required", it is not referring to an Act 9 application since said statute does not require any showing that the applicant "has secured the necessary franchise or consent."

In sharp contrast to Act 16 and Act 9, however, Act 69 includes specific franchise or consent requirements which must be satisfied prior to filing the application for Act 69 authority:

460.503 Petition; contents.

> Sec. 3. Before any such certificate of convenience and necessity shall issue, the applicant therefor shall file a petition with the commission stating the name of the municipality or municipalities which it desires to serve and the kind of service which it proposes to render, and that *the applicant has secured the necessary consent or franchise* from such municipality or municipalities authorizing it to transact a local business.

MCL 460.503.

From the above, it is evident that, by statute, an Act 69 application must show that the applicant *"has secured the necessary consent or franchise."* Thus, when Rule 601 (2)(d) references a showing of "the appropriate franchise or consent [having] been obtained, *if required*" (emphasis added), it is referring to an Act 69 application, *i.e,* where the relevant statute requires that the application show that the applicant "has secured the necessary franchise or consent".[13] All three statutes were enacted in 1929. In 1929, the Legislature passed Act 9 before it passed Act 16; and it passed Acts 9 and 16 before it passed Act 69. In interpreting statutes, the Legislature is presumed to be aware of prior acts passed, especially in the same legislative session. *See e.g. People v Cash*, 419 Mich 230, 241; 351 NW2d 882 (1984); *Walen v Dep't of Corrections*, 443 Mich 402, 248; 505 NW2d 519 (1993). In other words, the

[13]Another example of a statute which provides that the Commission may require a regulated entity to show that it has obtained consents is 1909 PA 106, §4, MCL 460.554, which provides, in pertinent part, as follows:

> If required by the commission, an electric utility erecting lines to transmit electricity in or through the highways, streets, or public places of 1 or more counties of this state shall prepare and file with the commission . . . *the franchise or consent under which those lines were constructed or are being maintained*, and other information the commission reasonably requires. . . . (emphasis added)

Legislature is presumed to have understood that the third of the three statutes enacted (Act 69), required a showing that a franchise or consent had been secured before filing the application, while the first two statutes enacted (Acts 9 and 16) included no such requirement. *Id.*

Further, that Acts 9 and 16 include no requirement that local consents or franchises be secured prior to seeking MPSC authority makes eminent sense when the three enactments' purposes are analyzed. Acts 9 and 16 relate to the construction and operation of natural gas and petroleum pipelines, respectively. These statues were intended to ensure that MPSC oversight remained and that such pipelines provided access on a non-discriminatory basis. Act 69, however, had an entirely different purpose. An Act 69 certificate of public convenience and necessity is required only for the *second utility* in a service area, *i.e.*, the first utility need not obtain such authority. This makes sense when one realizes that Act 69's purpose is to prevent duplication of facilities and waste inherent in situations in which [the second] public utility seeks to serve another utility's existing customer. *City of Marshall, supra* at 678. Thus, the Legislature wanted to make sure that the second utility could present the MPSC with the requisite consent or franchise before the MPSC would consider the Act 69 filing. No similar reasoning applied in the case of Act 9 or Act 16 approvals. Accordingly, the Legislature did not require consents or franchises prior to obtaining Act 9 or Act 16 approvals from the MPSC.

Nowhere does Act 16 hint that the MPSC should await the presentation of all required consents and franchises prior to entertaining an Act 16 application. The City has not cited a single MPSC Act 16 proceeding in which it had been determined that a franchise or consent must precede the filing of an Act 16 application. Such a requirement would make no sense. The Legislature did not intend to put the MPSC in the business of carefully reviewing every local, county and state permit requirement prior to accepting Act 16 applications. Such an

interpretation also makes sense in light of Rule 103(2) of the MPSC's Rules of Practice and Procedure, R 460.17103(2). which provides:

> (2) These rules shall be liberally construed to secure a just, economical, and expeditious determination of the issues presented.

It is not economical or expeditious to require an Act 16 applicant to present its consent(s) prior to seeking MPSC approval.

Moreover, because no statute or administrative rule requires a demonstration of local consent as part of an Act 16 application, the MPSC is not ignoring any of its statutory and administrative responsibilities as claimed by the City. Accordingly, the MPSC's ruling that no consent must be submitted with an Act 16 application as a prerequisite is lawful and should be affirmed.

CONCLUSION AND RELIEF REQUESTED

Wolverine respectfully requests that this Court reverse the Court of Appeals June 5, 2003 decision holding that local consent is required under MCL 247.183 when a pipeline company seeks to construct a petroleum products pipeline within an interstate highway right-of-way and also rule that Article 7, Section 29 of the Michigan Constitution of 1963 does not require similar consent. Wolverine respectfully requests that this Court affirm the MPSC's July 23, 2002 Order approving the pipeline and also hold that no administrative or statutory provision requires a

demonstration of local consent as part of an Act 16 application to the MPSC.

Respectfully submitted,

WOLVERINE PIPE LINE COMPANY

By: _____

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
124 W. Allegan
Lansing, MI 48933
(517) 374-9155/9184

Of counsel:
Paul O'Konski
Law Department
Wolverine Pipe Line Co.
P.O. Box 2220
Houston, TX 77252-2220
(713) 656-4669

Dated: November 6, 2003

LAN01\115273.1
ID\CMMA

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Docket No. 243182

MAYOR OF THE CITY OF LANSING, CITY OF LANSING, and INGHAM COUNTY COMMISSIONER LISA DEDDEN,

Appellees/Cross-Appellants,

v

MICHIGAN PUBIC SERVICE COMMISSION and WOLVERINE PIPE LINE COMPANY

Appellants/Cross-Appellees.

Supreme Court
Case No. 124136

Court of Appeals
Case No. 243182

MPSC Case No. U-13225

James D. Smiertka (P20608)
John M. Roberts Jr. (P19502)
Margaret E. Vroman (P34502)
Brian W. Bevez (P28736)
Office of Lansing City Attorney
Attorneys for Appellees & Cross Appellants
Mayor David C. Hollister and
City of Lansing
5th Floor, City Hall
Lansing, MI 48933
(517) 483-4320

Albert Ernst (P24059)
Christine Mason Soneral (P58820)
DYKEMA GOSSETT PLLC
Attorneys for Appellant & Cross Appellee
Wolverine Pipe Line Company
124 W. Allegan
Lansing, MI 48933
(517) 374-9155/9184

Of Counsel:
Paul O'Konski
Law Department
Wolverine Pipe Line Co.
P.O. Box 2220
Houston, TX 77252-2220
(713) 656-4669

Mary Massaron Ross (P43885)
Attorneys for Appellees & Cross-Appellants
Plunkett & Cooney, PC
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

Jennifer M. Granholm
Attorney General of Michigan
Thomas L. Casey
Solicitor General
David A. Voges (P25143)
Henry J. Boynton (P25242)
William W. Derengoski (P34242)
Assistant Attorneys General
Public Service Division
6545 Mercantile Way, Suite 15
Lansing, MI 48911
(517) 241-6680

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF INGHAM)

Jeanne M. Beachnau, an employee of Dykema Gossett PLLC, being first duly sworn, deposes and says that on the 5th day of November, 2003, she served two copies of Cross-Appellee Wolverine Pipe Line Company's Brief on Appeal - Oral Argument Requested and Appendix upon the persons listed in the attached Service List at their respective addresses, by enclosing copies of the same in an envelope properly addressed, and by depositing said envelope in the United States Mail with postage thereon having been fully prepaid.

Jeanne M. Beachnau

Subscribed and sworn before
me this 5th day of November, 2003.

Trace Graham, Notary Public
Ingham County, Michigan
My Commission Expires: 08/20/06

SERVICE LIST

James D. Smiertka
John M. Roberts Jr.
Margaret E. Vroman
Brian W. Bevez
City of Lansing
5th Floor, City Hall
Lansing, MI 48933

Mary Massaron Ross
BY FEDERAL EXPRESS
Plunkett & Cooney, PC
535 Griswold, Suite 2400
Detroit, MI 48226

David A. Voges, Esq.
Henry J. Boynton
William Derengoski
Assistant Attorneys General
6545 Mercantile Way # 15
Lansing, MI 48911

LAN01\115550.1
ID\CMMA